QUESTION PRESENTED

The United States will address the following question:

Whether North Carolina's Congressional District 12 is narrowly tailored to further compelling state interests.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-923

RUTH O. SHAW, ET AL., APPELLANTS

v.

JAMES B. HUNT, JR., GOVERNOR OF NORTH CAROLINA, ET AL.

No. 94-924

JAMES ARTHUR "ART" POPE, ET AL., APPELLANTS

v.

JAMES B. HUNT, JR., GOVERNOR OF NORTH CAROLINA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES

INTEREST OF THE UNITED STATES

This case requires the Court to construe and apply the Voting Rights Act of 1965, 42 U.S.C. 1971, 1973 *et seq*. The United States, acting through the Department of Justice, has been given a direct role in the enforcement of the Voting Rights Act and has an interest in its continuing effectiveness. The case also requires the Court to construe the Equal Protection Clause of the Fourteenth Amendment as it relates to race-conscious districting. The United States has a significant interest in that issue for the same reasons.

STATEMENT

1. North Carolina has a long history of racial discrimination against blacks in voting. That history has included use of techniques such as a poll tax, a literacy test, a prohibition against bullet voting, and designated seats for multi-member districts. See *Thornburg* v. *Gingles*, 478 U.S. 30, 38-39 (1986); see also *Gingles* v. *Edmisten*, 590 F. Supp. 345, 359-374 (E.D.N.C. 1984), aff'd in part, rev'd in part *sub nom. Thornburg* v. *Gingles*, 478 U.S. 30 (1986). The effects of that racial discrimination, including low black voter registration, continued long after the State abandoned those devices:[1] "[H]istoric discrimination in education, housing, employment, and health services * * * resulted in a lower socioeconomic status for North Carolina blacks as a group than for whites"; that lower status "both gives rise to special group interests and hinders blacks' ability to participate effectively in the political process and to elect representatives of their choice." 478 U.S. at 39.

Overt racial appeals have occurred in many election campaigns in North Carolina, including United States senatorial and state gubernatorial races as late as the 1950s and 1960s. J.A. 613-616. Racial appeals continued through the 1970s and 1980s and have persisted even in the 1990s. J.A. 616-620, 623-624. During the 1990 United States senatorial race, for example, African-American voters received postcards containing misinformation about

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[1] Because of the use of tests and devices in the state voting process, and low voter registration or participation, 40 of the counties in North Carolina are covered by Section 4(b) of the Voting Rights Act of 1965, 42 U.S.C. 1973b(b); 28 C.F.R. Pt. 51, App. A.

state voting laws, designed to intimidate those voters from voting. J.S. App. 94a n.57.[2]

Voting choices in North Carolina have been and continue to be significantly polarized by race. See J.A. 575-597. Reviewing evidence of that phenomenon in *Gingles*, 478 U.S. at 52-61, 80-82 (Appendix A), this Court concluded that statistical evidence clearly established that black voters in the State are politically cohesive and that white bloc voting usually led to defeat of candidates who were supported by black voters. *Id.* at 59. Evidence in the instant case, based on the same methodologies, see J.A. 576, established that this phenomenon persists. J.A. 575-597 (Exh. 404).

Racial discrimination has directly affected the congressional districting process in North Carolina. See J.A. 621-624. After 1965, as black voting was becoming a significant political factor, state legislators split a potential congressional district because it would have given substantial political power to black voters; the legislature instead created a racially gerrymandered district that deliberately minimized the voting power of black citizens for years. J.A. 621-622. After the State's initial 1981 redistricting effort attempted to perpetuate that deliberate discrimination and met a Section 5 objection, the State finally created a district in the northeast part of the State with a population that was 40% black. J.A. 622-623. The minority-preferred candidate who ran for Congress in 1982 in the reconfigured district was defeated in the Democratic primary by a white candidate who used appeals long associated with racial politics in the State. See J.A. 623.

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[2] A suit brought by the United States, alleging intimidation in violation of 42 U.S.C. 1971(b) and 1973i(b), was settled by consent decree on February 27, 1992. *United States* v. *North Carolina Republican Party*, No. 91-161-CIV-S-F (E.D.N.C.).

All three of the other African Americans who ran for Congress from North Carolina in the 1980s were defeated by white incumbents. J.A. 66-67. Prior to the 1992 congressional redistricting plan at issue in this case, the last African American in the United States Congress from North Carolina had served from 1897 to 1901, representing the old "Black Second" district in the northeast part of the State. Stip. ¶ 130.

2. As a result of the 1990 decennial census, North Carolina became entitled to an additional congressional seat, thus increasing the number of its congressional districts from 11 to 12. The State's population as of that census was 6,628,637. Approximately 22% of that population is African-American and 1.2% is American Indian. J.S. App. 82a. There are "major, discrete concentrations of African-American population throughout the state, the most significant ones of which, reflecting historical forces dating from slavery," are located in the "heavily rural, agricultural northeast" area of the Coastal Plain, and "in the historic 'black sections' of the state's five largest cities and of the other smaller cities" all located in the Piedmont region. *Id.* at 83a; Exh. 415 (map). The eastern Coastal Plain, the Piedmont region, and the western mountains constitute three distinct geographic regions of the State, each with its distinctive history, culture and economy. *Shaw* v. *Reno*, 113 S. Ct. 2816, 2820 (1993); see also J.S. App. 82a; J.A. 167-168.

In 1991, the North Carolina General Assembly redistricted the State into 12 congressional districts. From the outset of the process, members of the legislature debated whether any black opportunity districts should be created. J.S. App. 85a.[3] Some legislators believed that

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[3] An opportunity district is a district in which the relevant minority group has a meaningful opportunity to elect the repre-

they might be legally obliged to draw two such districts to comply with the Voting Rights Act. *Ibid.*; J.A. 402-403. Other legislators resisted drawing any such districts. The Democratic-controlled state legislature sought to craft as many districts as possible containing a majority of Democratic voters. See *Shaw* v. *Reno*, 113 S. Ct. at 2841 n.10 (White, J., dissenting). Legislators also sought to protect incumbents. The legislature ultimately set forth standards to govern the redistricting process. Those included equality of district population, conformity of districts with the Constitution and the Voting Rights Act, contiguity of districts, and preserving, where possible, census block and precinct integrity. J.S. App. 84a. Neither compactness nor preservation of political subdivisions was adopted as a districting criterion. See Stip. Exh. 9.

State House and Senate subcommittees were charged with developing the redistricting plan. They prepared a series of plans which, beginning in May, 1991, were discussed in committee, at public hearings and on the floor of the state House and Senate. J.S. App. 85a. The committees' plans each contained one black opportunity district, District 1, centered in the large rural area of the Coastal Plain. *Ibid.*; J.A. 50-54; see Stip. Exh. 10. In June, David Balmer, a Republican state representative, submitted to the House subcommittee an alternative plan that contained two black opportunity districts, Districts 1 and 12. The location of Balmer's District 1 was similar to that

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sentative of its choice, despite racial discrimination in voting, either because the group constitutes a voting majority in the district or because it constitutes a sizable minority that can elect its preferred candidate because some non-minority voters will be willing to vote for the minority-preferred candidate.

of the subcommittees' District 1; Balmer's District 12 was located in the southern part of the State, beginning in Charlotte and extending southeast to Wilmington.[4] The House ultimately rejected a refinement of Balmer's two-black-opportunity-districts plan. J.A. 51-52. Balmer later submitted a second alternative plan containing two black opportunity districts located in the northeast part of the State. J.A. 54; Stip. Exh. 10, attachment C-27R-6. The House also rejected this plan. J.A. 54. During this process, civil rights groups joined Republicans in advocating that a second black opportunity district be included in the districting plan. J.A. 54. Democrats tended to oppose a second black opportunity district because the plans containing such a district seemed designed to further Republicans' partisan interests. See J.S. App. 80a.

The Democratically controlled legislature ultimately enacted a plan that became Chapter 601 of the 1991 Session Laws. J.S. App. 86a; J.A. 53-54. That plan's single black opportunity district, District 1, was centered in the rural northeast portion of the Coastal Plain with an arm extending westward to inner-city Durham. See J.S. App. 86a.

Chapter 601 was submitted for preclearance under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. J.S. App. 86a. Republican Members of Congress from North Carolina had written to the Department of Justice contending that the plan violated the Voting Rights Act. J.A. 174-175. Representative Balmer also urged rejection of Chapter 601 because it violated the Act. J.A. 78-90. He stated that there were several ways to draw

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[4] Balmer's District 12 had a population that was 48% African-American and 8% American Indian. See Stip. Exh. 10, attachment C-27R-4. Representative Balmer believed that these groups would vote cohesively for minority-preferred candidates in general elections. Exh. 200, at 1005-1006.

two minority opportunity districts and that Chapter 601 diluted minority voting strength. J.A. 79-81. Balmer provided statistics supporting that claim as well as maps of alternative plans. J.A. 82-90. Various other entities wrote the Attorney General urging denial of preclearance. See J.A. 55.

The Attorney General, after conducting an independent analysis of the State's redistricting process, objected to Chapter 601. J.A. 147-154. In the December, 1991, objection letter, the Assistant Attorney General for the Civil Rights Division stated that a plan cannot be precleared "where the legislature has deferred to the interests of incumbents while refusing to accommodate the community of interest shared by insular minorities." J.A. 148, citing *Garza* v. *County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991); *Ketchum* v. *Byrne*, 740 F.2d 1398, 1408-1409 (7th Cir. 1984), cert. denied, 471 U.S. 1135 (1985). He noted that the legislature had been presented with plans that included a second minority opportunity district that appeared to give effect to significant minority voting strength. J.A. 152-153. Those plans had boundaries no more irregular than some district boundaries already found in Chapter 601. J.A. 152. The Assistant Attorney General concluded that the reasons given by the State for rejecting the alternative plans appeared pretextual, emphasizing that it was "alleged that the state's decision to place the concentrations of minority voters in the southern part of the state into white majority districts attempts to ensure the election of white incumbents while minimizing minority electoral strength." J.A. 153.

3. The North Carolina legislature convened on December 30, 1991, to consider what action to take in view of the Section 5 objection. Representative Balmer submitted for consideration a plan containing a second black opportunity

district in the Piedmont area. Stip. ¶ 82; J.A. 58; Exh. 416 (map). At the prompting of the Member of Congress whose incumbency was threatened most by Balmer's earlier plans, a variation on this plan was modified and a version of it was introduced at a public hearing. J.A. 58-59.

The legislative debate about whether to create black opportunity districts resumed. There was also debate about whether to seek judicial preclearance for Chapter 601. Several Democrats urged such a suit, while Republicans urged that no suit be brought and that two black opportunity districts be created. J.S. App. 88a; J.A. 57. One legislator invoked the State's long history of discrimination against African Americans in voting, asserted that this discrimination was still in need of correction, and that it was the reason for the Voting Rights Act and the *Gingles* decision. Exh. 200, at 902, 908-909, 956-957; J.A. 215-220, see also J.A. 212-214, 236-237; J.S. App. 89a-90a. Others mentioned the possibility that the State would be sued under *Gingles* (Section 2) if only one black opportunity district was created, Tr. 692, and some believed that the Section 5 objection was valid, J.A. 209-210. *Gingles* and its implications were discussed by staff, on the floor and at community hearings. Tr. 692.

Some members of the public testified at hearings that the major urban areas in the State should be placed together in a district in the Piedmont because that would enhance urban voting strength and would also "enhance[] the political power of the small, rural counties by removing the large metropolitan areas from their districts, and an overwhelming influence in the electoral process with them. This allows a better distribution of political power throughout the state." J.A. 189-190. Various legislators agreed. See J.A. 198, 203-205, 396, 410-412. Others urged a black opportunity district in the southeast (Exh. 200, at 895), contending that there was a compact

minority district that the legislature had not recognized because it was too concerned with partisan politics (*id.* at 898), and asserting that action recognizing black population concentrations should have been taken regardless of the position of the Attorney General. See J.A. 210, 211-225. The Piedmont plan was more attractive to Democrats than other two-black-opportunity-district plans because it might enhance their chances of winning additional congressional seats. J.A. 157.

The State's redistricting expert made the proposed Piedmont district more urban by modifying it so that 80% of its residents live in cities with populations of 20,000 or more. He made the other black opportunity district more rural by modifying it so that 80% of its residents live outside areas with 20,000 or more people. J.S. App. 97a, 100a. Further refinements to the ultimate shape of the two districts were made to respond to incumbency protection and the need to meet the equal population requirement. See *id.* at 97a-101a, 109a. The plan was then sent to the legislature.

The North Carolina General Assembly adopted this plan on January 24, 1992. J.S. App. 101a. The plan was precleared by the Attorney General on February 6, 1992. J.A. 61. An election based on the new plan took place on November 3, 1992. African Americans were elected to the United States House of Representatives from the two black opportunity districts that the plan contains. They are the first blacks to serve as Members of Congress from North Carolina since 1901.

4. a. Plaintiff-appellants are five white registered voters who reside in Durham County, North Carolina, two of whom vote in District 12. *Shaw* v. *Barr*, 808 F. Supp. 461, 462, 464 (E.D.N.C. 1992). They filed suit challenging the redistricting plan as unconstitutional. They named as defendants the North Carolina Governor, the Board of

Elections and other state officials, J.S. App. 10a, all of whom are appellees. A three-judge panel dismissed the action against the state officials, concluding that appellants had failed to state a cause of action under the Equal Protection Clause. *Shaw* v. *Barr*, 808 F. Supp. at 469-473.

This Court reversed, holding that the plaintiff-appellants had "stated a claim under the Equal Protection Clause by alleging that the North Carolina General Assembly adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification." *Shaw* v. *Reno*, 113 S. Ct. at 2832. The Court noted that "[i]f the allegation of racial gerrymandering remains uncontradicted, the District Court further must determine whether the North Carolina plan is narrowly tailored to further a compelling governmental interest." *Ibid.*

b. On remand, the district court permitted intervenors on both sides of the suit and the case proceeded to trial before the three-judge court. Extensive evidence was submitted through live testimony, written statements, exhibits, maps and stipulations. J.S. App. 14a-15a & n.8.

The district court considered, as a threshold matter, whether North Carolina's plan must be subjected to strict scrutiny. J.S. App. 26a-38a. The court held that strict scrutiny is triggered when "racial considerations played a 'substantial' or 'motivating' role in the line-drawing process." *Id.* at 34a. Because the State conceded that it deliberately drew two districts so that African-American citizens had a voting majority in each, the court concluded that the plan required strict scrutiny. *Id.* at 110a.

c. Applying strict scrutiny, the district court held that North Carolina had a compelling interest in engaging in race-conscious redistricting in order to comply with

Sections 2 and 5 of the Voting Rights Act. J.S. App. 108a, 111a-113a. In the court's view, a State "has a 'compelling' interest in engaging in race-based redistricting to give effect to minority voting strength whenever it has a 'strong basis in evidence' for concluding that such action is 'necessary' to prevent its electoral districting scheme from violating the Voting Rights Act." *Id.* at 45a, citing *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 500 (1989); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 274-275 (1986) (opinion of Powell, J.). Such a basis is present when the State "has information sufficient to support a *prima facie* showing that its failure to [engage in race-conscious redistricting] would violate the Act." J.S. App. 48a, citing *Croson*, 488 U.S. at 500; *Wygant*, 476 U.S. at 292 (O'Connor, J., concurring in part and concurring in the judgment); *Johnson* v. *Transportation Agency*, 480 U.S. 616, 650-652 (1987) (O'Connor, J., concurring in the judgment). A prima facie case of a violation of Section 2 would be established by evidence of the so-called *Gingles* preconditions. J.S. App. 49a-50a, citing *Growe* v. *Emison*, 113 S. Ct. 1075, 1084 (1993); *Voinovich* v. *Quilter*, 113 S. Ct. 1149, 1157 (1993); *Johnson* v. *DeGrandy*, 114 S. Ct. 2647, 2658-2662 (1994).

With regard to reliance on Section 5 as a compelling state interest where the Department of Justice denies preclearance to a challenged plan because of the plan's failure to create additional minority opportunity districts, the court held that the State must be able to demonstrate that it conducted its own independent reassessment of the plan and reasonably concluded that the Department's objection was legally and factually supportable. J.S. App. 54a. The court stated that a State may also have a compelling interest in engaging in race-conscious redistricting in order to eradicate the effects of past or present racial discrimination in the political process, if

the State has a strong basis in evidence for believing that such remedial action is necessary to accomplish that result. *Id.* at 55a-57a & n.35, citing, *inter alia*, *Shaw* v. *Reno*, 113 S. Ct. at 2831-2832.

The district court then found that North Carolina in fact had a well-founded belief that a districting plan that contained only one black opportunity district would violate Section 2. J.S. App. 108a, 111a. That finding was based on extensive evidence, including the following: Numerous districting plans had been presented to the legislature that included two geographically compact black opportunity districts. *Id.* at 90a-93a. The legislative leadership recognized that the facts and circumstances could support a challenge to any single-minority-district plan under *Gingles*. *Id.* at 91a-92a. The Republican Party, the ACLU and other groups contended that Chapter 601 violated Section 2 because it had only one black opportunity district. *Id.* at 91a. Special counsel to the Republican Party had warned at a public hearing that failure to create two black opportunity districts might well lead to a federal court drawing the districts. *Id.* at 92a. The Justice Department had refused to preclear Chapter 601, believed that two black opportunity districts meeting the *Gingles* requirements could be drawn, and that the failure to do so would constitute impermissible vote dilution. *Ibid.* Legislators had personal experience in North Carolina politics (including the previous Section 2 litigation in *Gingles*) and one black opportunity district did not approach proportionality with African Americans' percentage of the State population. *Id.* at 92a. In addition, the court found that evidence at trial established the existence of the three *Gingles* preconditions—a sufficiently large and geographically compact population of African Americans that was politically cohesive, and widespread and persistent racial bloc voting that usually

defeated minority-preferred candidates. *Id.* at 92a-93a. That evidence confirmed that the State had a firm basis in evidence for believing that its creation of a second black opportunity district was required to avoid violating Section 2. *Id.* at 93a, 111a.

The district court also found that the State had conducted its own independent reassessment of Chapter 601 after denial of preclearance, and had a well-founded belief that the evidence relating to a potential Section 2 violation also established that the Attorney General's Section 5 objection to a one-minority-opportunity-district plan was "legally and factually supportable." J.S. App. 108a, 111a-112a. Finally, the court concluded that there was some "sentiment" in the legislature that creation of two black opportunity districts was also required as a remedy for the State's long and continuing history of voting-related race discrimination. *Id.* at 89a-90a. That sentiment, however, was not sufficient "in voting power" to cause the creation of the two districts "independent of the perceived compulsion of the Voting Rights Act." *Id.* at 108a.

d. The district court then concluded that North Carolina's two black opportunity districts were narrowly tailored to meet the State's compelling interests. J.S. App. 113a. That holding was supported by a number of factual findings including the following: The State did not create more black opportunity districts than reasonably necessary to comply with the Voting Rights Act. *Ibid.* The African-American voting majorities in the districts the State created were no greater than reasonably necessary to afford such citizens a reasonable opportunity to elect candidates of their choice. *Ibid.* The State's two-district plan (2 out of 12 seats, or 16.7%) is reasonably related to the percentage of African-American voters in the State (22%). *Ibid.* The two-district plan would

necessarily be reconsidered at the time of the next decennial census, and would therefore last no longer than reasonably necessary to eliminate the effects of the discrimination it is aimed at redressing. *Ibid.* The court found, finally, that the plan does not impose an undue burden on innocent third parties, because the districts it creates comply with all constitutionally mandated principles, are based on rational districting principles that ensure fair and effective representation to all citizens, and were "designed to be and are in fact highly homogeneous in terms of their citizens' material conditions and interests, and do not significantly inhibit access to and responsiveness of their elected representatives." *Id.* at. 113a-114a.

Chief District Judge Voorhees dissented from the court's conclusion that strict scrutiny was satisfied.

SUMMARY OF ARGUMENT

A. North Carolina had a compelling interest in creating two black opportunity districts to comply with Section 2 of the Voting Rights Act. The district court correctly found that the State believed, and had a strong basis in evidence for believing, that such districts are required because (1) blacks in North Carolina are sufficiently numerous and geographically concentrated to have the potential to elect candidates of their choice in two reasonably compact districts; (2) black voters in North Carolina are politically cohesive; (3) the white majority usually votes sufficiently as a bloc to enable it to defeat the black minority's preferred candidate; and (4) the failure to create two such districts would leave minority group members substantially underrepresented when compared to their percentage in the population. *Gingles*, 478 U.S. at 50-51; *DeGrandy*, 114 S. Ct. at 2658. Those

factual findings are supported by substantial evidence and are not clearly erroneous.

B. North Carolina also had a compelling interest in complying with Section 5 of the Act. The district court found that the State conducted its own independent reassessment of Chapter 601 after denial of preclearance and reasonably concluded that the Department of Justice's Section 5 objection to the State's plan was legally and factually supportable. Those factual findings are also supported by substantial evidence and are not clearly erroneous.

C. The district court correctly found District 12 to be narrowly tailored to further the State's compelling interests. The court found that the State did not use race more than was necessary to carry out the compelling state interest and that any departures from its traditional districting principles were no greater than necessary to serve its compelling interests.

The State was not foreclosed from drawing the two black opportunity districts in locations different from the precise district configurations underlying potential Section 2 liability. To foreclose a State from using nonracial districting criteria in implementing its obligation to create minority opportunity districts would seriously undermine voluntary compliance with the Voting Rights Act. Here, state interests in protecting incumbency and in having districts reflect communities of interest among district residents were served by the location and shape of District 12. Geographic compactness was not adopted as one of North Carolina's statutory districting criteria and the departures from compactness here were made in response to legitimate, nonracial districting interests.

ARGUMENT

The district court held that minority opportunity voting districts are subject to strict scrutiny if "racial considerations played a 'substantial' or 'motivating' role in the line-drawing process, even if they were not the only factor that influenced that process." J.S. App. 34a. This decision appears to be in conflict with this Court's subsequent decision in *Miller* v. *Johnson*, 115 S. Ct. 2475 (1995).

In *Miller*, the Court held that strict scrutiny is triggered when "race was the *predominant* factor motivating the legislature's decision to place a significant number of voters within or without a particular district." 115 S. Ct. at 2488 (emphasis added). "To make this showing, a plaintiff must prove that the legislature *subordinated traditional race-neutral districting principles*." *Ibid.* (emphasis added). A plaintiff satisfies this "demanding" threshold standard only where he or she can "show that the State has relied on race *in substantial disregard of customary and traditional districting practices*." *Id.* at 2497 (O'Connor, J., concurring) (emphasis added).

No such showings were made here. Nor did the district court determine, in deciding that strict scrutiny was applicable, that race was the predominant factor motivating the creation of District 12, or that the North Carolina legislature subordinated its own race-neutral districting principles in the creation of the District. Accordingly, the United States joins the contention made by appellees that the district court incorrectly concluded that strict scrutiny was applicable. The Court need not address that question, however, because the district court correctly held that the State's redistricting plan satisfies strict scrutiny. See *United States* v. *Paradise*, 480 U.S. 149, 166-167 (1987) (opinion of Brennan, J.) (declining to decide

whether court-ordered race-conscious relief was subject to strict scrutiny because the relief ordered satisfied such scrutiny).

NORTH CAROLINA'S CONGRESSIONAL DISTRICT 12 IS NARROWLY TAILORED TO FURTHER COMPELLING STATE INTERESTS

The district court correctly held that a State has a compelling interest in creating minority opportunity districts if the State has a strong basis in evidence for believing that such action is necessary to comply with Section 2 or Section 5 of the Voting Rights Act. See J.S. App. 45a, 48a. This Court has repeatedly recognized that both the federal and state governments have a compelling interest in eliminating racial discrimination and its lingering effects. *Shaw* v. *Reno*, 113 S. Ct. at 2831-2832; *Adarand Constructors, Inc.* v. *Pena*, 115 S. Ct. 2097, 2117 (1995); *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 604 (1983). The Voting Rights Act was adopted to further that interest by "banish[ing] the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966). In the words of the district court, "the Supreme Court has recognized consistently that the Voting Rights Act is the single most important piece of federal anti-discrimination legislation ever passed by Congress—enacted, and then twice extended, with the avowed purpose of putting a stop to nearly a century of '"unremitting and ingenious defiance" of the commands of the Fifteenth Amendment' by the states." J.S. App. 45a-46a, quoting in part *McCain* v. *Lybrand*, 465 U.S. 236, 243 (1984).

This Court has not yet specifically addressed the question whether compliance with the Voting Rights Act, standing alone, can constitute a compelling state interest

for race-conscious redistricting. See *Miller*, 115 S. Ct. at 2490-2491. The answer to that question must, we believe, be an affirmative one. As the district court below observed, the Court has recognized that a State's compelling interest in eradicating the effects of its own past or present racial discrimination "extends to remedying past or *present violations of federal statutes* that are designed to eradicate such discrimination in particular aspects of life." J.S. App. 44a (emphasis added), citing *Croson*, 488 U.S. at 500 ("constitutional or statutory violation[s]"); *Wygant*, 476 U.S. at 274-275 (opinion of Powell, J.) (Title VII); *id.* at 289 (O'Connor, J., concurring in part and concurring in the judgment) ("violation[s] of federal statutory or constitutional requirements"); *Regents of Univ. of California* v. *Bakke*, 438 U.S. 265, 307-309 (1978) (opinion of Powell, J.) ("constitutional or statutory violations"). Both the background of the Voting Rights Act and this Court's precedents thus establish that a State has a compelling interest in taking race-conscious action to protect minority voting rights from dilution when to act otherwise would violate the Voting Rights Act. We refer the Court to our more detailed discussion of that legal issue in the brief for the United States in *Bush* v. *Vera*, No. 94-805, *Lawson* v. *Vera*, No. 94-806, and *United States* v. *Vera*, No. 94-988, prob. juris. noted (June 29, 1995), a copy of which was filed on August 28, 1995 (Gov't Vera Br.). See also J.S. App. 46a-47a.

Nor need a State await an official finding that it is "guilty of past or present discrimination before embarking on a voluntary program of remedial action * * * so long as it has a 'strong basis in evidence' for concluding that such remedial action is 'necessary.'" J.S. App. 44a-45a, citing, *inter alia*, *Croson*, 488 U.S. at 500, and *Wygant*, 476 U.S. at 277 (opinion of Powell, J.); J.S. App. 48a; see also *Miller*, 115 S. Ct. at 2491. The "strong basis in evidence"

standard encourages voluntary compliance with the law by providing States with a margin of safety against the "competing hazards" of liability to minorities, if they do not create minority opportunity districts, and liability to others, if they do. *Wygant*, 476 U.S. at 291 (opinion of O'Connor, J.). When States voluntarily comply with the Voting Rights Act, they retain the flexibility to weigh other state interests and competing political pressures in the redistricting process. *Miller*, 115 S. Ct. at 2488.[5]

A. North Carolina Had A Compelling Interest In Creating Two Black Opportunity Districts In Order To Comply With Section 2 Of The Voting Rights Act

1. Appellants contend (Shaw Br. 31; Pope Br. 28) that avoiding a Section 2 violation cannot be the compelling interest supporting the State's redistricting plan in this case because that purpose is not expressed in the legislative history or the legislation itself. As the district court found, however, the legislative history of the North Carolina plan clearly reveals concerns about a possible violation of Section 2, as well as awareness of the existence of the factors that would prove a Section 2 case. See page 12, *supra*. Appellants' argument is, in all events, premised on a misunderstanding of the "close examination of legislative purpose," *Croson*, 488 U.S. at 495, in which

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[5] Two of the five plaintiffs live in District 12; none live in District 1. See *Shaw* v. *Reno*, 113 S. Ct. at 2821. None of the plaintiff-intervenors live in either District 12 or District 1. Accordingly, if the plaintiffs have standing (but see State Br. 28-31 and Intervenor Appellees Br. 6-13 (arguing that appellants do not have standing to challenge either District)), it is standing to challenge the validity only of District 12, not District 1. See *United States* v. *Hays*, 115 S. Ct. 2431 (1995). In any event, District 1, like District 12, is narrowly tailored to further the State's compelling interests.

the Court engages when reviewing classifications under heightened scrutiny.

The inquiry into a statute's purpose is not resolved by looking exclusively at the public pronouncements of legislators. Rather, the inquiry requires "an examination of the factual basis for [the statute's] enactment and the nexus between its scope and that factual basis." *Croson*, 488 U.S. at 494-495 (opinion of O'Connor, J.). In this case, the district court found that the redistricting plan was in fact enacted because of a well-founded belief by a majority of the legislature that failing to include a second black opportunity district might violate Section 2. J.S. App. 108a.

2. There was ample evidence to support the district court's finding that the North Carolina legislature acted because of a belief that the State would violate Section 2 if it did not create two black opportunity districts in its 1991 redistricting plan.[6] It found that legislators were well aware of contentions that plans that contained only one black opportunity district would result in vote dilution—a Section 2 violation. J.S. App. 90a-91a. It found it especially pertinent that "[w]ell over half the members of the 1991 General Assembly had been members of the 1986 General Assembly, which had been required by a federal court in the *Gingles* litigation to create 8 State House and Senate majority-minority districts in order to remedy violations

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[6] Appellants contend that the district court erred in placing the burden of persuasion on them. They claim that "once racial gerrymandering had been established, the burden of producing evidence and the burden of persuasion should both have rested on the Appellees." Shaw Br. 17, 45-47; Pope Br. 14-15, 19-23. The district court correctly rejected this argument. J.S. App. 42a-43a; see also State Br. 37-38. In all events, it does not appear that any of the district court's findings of fact depend on its allocation of the burden of proof. See, *e.g.*, J.S. App. 93a (finding that "overwhelming," "undisputed," and "considerable" evidence established the existence of the three *Gingles* preconditions).

of amended § 2." *Id.* at 90a. The district court concluded that, "[b]eyond any question," the dominant concern behind enactment of the final redistricting plan was "a perception that * * * the Chapter 601 plan, and any other congressional redistricting plan which did not contain at least two majority-minority districts, would in fact violate the Voting Rights Act (or be so likely to violate the Act that in prudence it must be assumed to do so)." *Ibid.* That factual finding is not open to serious challenge.

The district court also found that the legislature reasonably believed that conditions in North Carolina were such that a Section 2 case could likely be made against any redistricting plan that did not contain two black opportunity districts. J.S. App. 91a. The concerns that legislators expressed during debates that led to enactment of the final plan directly reflected the factors necessary to establish a Section 2 violation under *Gingles*. *Id.* at 91a-92a. Evidence adduced at trial confirmed that a successful Section 2 case could be brought if two black opportunity districts were not created. *Id.* at 92a-93a. Ample evidence supports the district court findings as to the reasonableness of the legislature's belief in the credibility of a Section 2 challenge; none of the findings can plausibly be deemed clearly erroneous. See *Miller*, 115 S. Ct. at 2489 (applying clearly erroneous standard to review of district court's findings regarding what factors motivated legislature in drawing redistricting plan); *Gingles*, 478 U.S. at 79 (findings of fact regarding elements of Section 2 claim are subject to review only for clear error).

The evidence presented both before the General Assembly and at trial showed that it was possible in North Carolina to draw two reasonably compact districts with sufficient black population to provide black voters the opportunity to elect candidates of their choice in those

districts, and the district court so found. When it enacted Chapter 601, the State had already determined that the concentration of African Americans in the northeast Coastal Plain required at least one black opportunity district. There also were significant concentrations of African Americans in other parts of the State, most obviously in Charlotte in Mecklenburg County. Plans prepared by appellants' own expert witnesses contained two black opportunity districts that were "'geographically compact' under any reading of *Gingles*." J.S. App. 82a (referring to plans designated Shaw II and Shaw III).

The district court also found that North Carolina had a strong basis for believing that the other *Gingles* preconditions were met. The evidence of the political cohesiveness of the African-American population in North Carolina was undisputed. J.S. App. 98a. Under a redistricting plan that contained only one black opportunity district, African Americans in North Carolina also would not approach a level of representation proportionate to their percentage in the State's population. *Id.* at 95a.

Finally, the evidence also established that whites engage in significant bloc voting against black-preferred candidates. J.S. App. 98a. The district court specifically found that members of the legislature could not help but be aware of this phenomenon in light of their experience in running for office themselves and in observing other campaigns. *Id.* at 98a. The district court found that racial bloc voting persists in all the major areas of African-American population concentration. Appellees' expert witness, Dr. Richard L. Engstrom, analyzed all recent congressional elections in North Carolina (since 1968) in which an African-American candidate ran against a white candidate, as well as all statewide elections and state legislative elections (since 1968) in which white and black candidates ran against one another. He found that racially

polarized voting persists across the State. J.A. 596-597. A number of the most polarized elections took place in state House or Senate districts that are included, in whole or in part, in either the enacted Congressional District 12 or the alternative proposed district that ran from Charlotte eastward. See Exh. 404, Tables 3A through 5C.[7]

B. North Carolina Also Had A Compelling Interest In Creating Two Black Opportunity Districts In Order To Comply With Section 5 Of The Voting Rights Act

A compelling state interest in complying with Section 5 of the Voting Rights Act also supported North Carolina's decision to establish two black opportunity districts in its congressional redistricting plan. The court below correctly found that the State had a firm basis in evidence for believing that its failure to adopt a plan containing two black opportunity districts would violate Section 5.

This case comes to the Court in a very different posture from that present in *Miller* v. *Johnson*. In seeking preclearance North Carolina had defended its adoption of Chapter 601, in lieu of one of the proffered alternative plans that included two black opportunity districts, by contending that the districts in the alternative plans were too lacking in compactness. A glance at the districts in the Chapter 601 plan, however, reveals the inaccuracy of that explanation because Chapter 601 contained majority-white districts that also lacked compactness. There was good reason for the Justice Department to believe, therefore, that incumbency, not compactness, was the interest the legislature had chosen to serve. Protection of incumbents, however, though generally a legitimate

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[7] Polarized bloc voting also was significant in state legislative districts that are incorporated, in whole or in part, in the other black opportunity district, Congressional District 1. See Exh. 404, Tables 3A through 5C.

districting consideration, *Gaffney* v. *Cummings*, 412 U.S. 735 (1973), can mask intentional discrimination against minority voters and cannot justify a plan that impermissibly dilutes minority voting strength. See *Garza*, 918 F.2d at 768 n.1, 771; *id.* at 778-779 (Kozinski, J., concurring and dissenting in part); *Ketchum*, 740 F.2d at 1406-1408; *Armour* v. *Ohio*, 775 F. Supp. 1044, 1060-1061 (N.D. Ohio 1991) (three-judge court); *Rybicki* v. *State Bd. of Elections*, 574 F. Supp. 1082, 1103 & n.64, 1109 (N.D. Ill. 1982) (three-judge court).

The Department of Justice thus denied North Carolina preclearance for Chapter 601 because the State failed to meet its burden of demonstrating that the plan did not violate the purpose prong of Section 5. J.S. App. 51a n.29; *id.* at 51a-54a & n.30. That prong prevents preclearance in cases where a State has failed to show that its proposed plan was not designed to dilute minority voting strength. *City of Port Arthur* v. *United States*, 459 U.S. 159, 168 (1982); *City of Richmond* v. *United States*, 422 U.S. 358, 378-379 (1975); see *Busbee* v. *Smith*, 459 U.S. 1166 (1983). The letter denying preclearance noted that one of the circumstances in which preclearance is denied is when "the legislature has deferred to the interests of incumbents while refusing to accommodate the community of interest shared by insular minorities." J.A. 148, citing *Garza*, 918 F.2d at 771; *Ketchum*, 740 F.2d at 1408-1409. The letter stated that "some commenters have alleged that the state's decision to place the concentration of minority voters in the southern part of the state into white majority districts *attempts to ensure the election of white incumbents while minimizing minority electoral strength.*" J.A. 153 (emphasis added). North Carolina was invited to provide convincing evidence to the contrary, but the State failed to do so. *Ibid.* The State's justification for

not creating more than one black opportunity district was deemed pretextual and preclearance was denied.

The interaction between North Carolina and the Department of Justice in this case does not in any respect reflect any "maximization" objective the Court found present in *Miller*. The district court in this case found as fact that North Carolina conducted its own independent reassessment of its plan in light of the Justice Department's concerns and reasonably concluded that the Department's objection was legally and factually supportable. J.S. App. 94a, 111a-1112a. That conclusion is corroborated by the fact that when the legislative leadership subsequently considered a proposal for a second minority opportunity district that would not hurt incumbents or radically shift the balance of political power, the leadership embraced that plan.[8]

C. District 12 Is Narrowly Tailored To Serve North Carolina's Compelling Interests

1. Appellants are wrong in their assertions (Shaw Br. 35-40; Pope Br. 40-45) that the State's plan fails the narrowly tailored inquiry because the black opportunity districts it created are not identical with those in the alternative plans that demonstrated that the State's initial

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[8] The district court also recognized that a State may have a compelling interest in creating minority opportunity districts in order to eliminate the discriminatory effects of past racial discrimination even when the Voting Rights Act may not require it. See J.S. App. 55a-57a. The court found that "[t]here was some patently honest sentiment, among both white and African-American legislators, that in view of the State's long history of race discrimination in voting matters persisting down to the present time, simple racial justice warranted [two black opportunity districts]." *Id.* at 89a. The court concluded, however, that a concern for remedial action, independent of a duty under the Voting Rights Act, would not have resulted in the creation of District 12. *Id.* at 108a.

plan was susceptible to a Section 2 challenge. Appellants' argument is based on a misunderstanding of the nature of Section 2's prohibition of the dilution of minority voting rights.

A Section 2 violation occurs when the members of a minority group are denied an equal opportunity to participate in the political process and to elect representatives of their choice. The Court's decision in *Gingles* identified three factors generally necessary to prove a Section 2 claim. The district court found that the State had a firm basis for believing that these factors were present here. The State thus had a compelling interest in adopting a plan that, based on a totality of circumstances, would ensure that the African-American minority was not denied the equal political participation that Section 2 guarantees.

Gingles indicates that one permissible response in such a situation is to draw geographically compact minority opportunity districts that the district court used in its *Gingles* analysis. But neither *Gingles* nor the Voting Rights Act compels that specific remedy. So long as the State adopts a plan that provides an equal opportunity to elect representatives of choice, Section 2 obligations are satisfied. See *Upham* v. *Seamon*, 456 U.S. 37, 42 (1982) (per curiam) (federal court must defer to a State's remedial plan so long as it satisfies the substantive requirements of federal law); cf. *McGhee* v. *Granville County*, 860 F.2d 110, 120-121 & n.11 (4th Cir. 1988) (county may remedy violation of Section 2 caused by multimember districts by increasing the size of the body or through limited voting scheme).

In this case, the district court found that the minority opportunity districts that the State adopted were designed to serve legitimate nonracial state interests, including incumbency and community of interest. There is no basis

for questioning the accuracy of this factual finding. In other contexts, this Court has accepted the principle that a State may choose less compact alternative districts if it wishes to protect incumbents. See *White* v. *Weiser*, 412 U.S. 783 (1973); *Burns* v. *Richardson*, 384 U.S. 73, 89 n.16 (1966). Compactness is not constitutionally required. *Shaw* v. *Reno*, 113 S. Ct. at 2827. As the district court noted, this Court "has repeatedly rejected claims that a state redistricting plan violates the Equal Protection Clause because it sacrifices [considerations such as geographical compactness, contiguity, and adherence to political subdivision boundaries] in order to achieve other legitimate redistricting objectives, such as protecting incumbents, preserving the integrity of established neighborhoods, and recognizing the voting strength of various political parties." J.S. App. 65a & n.42, citing *Gaffney*, 412 U.S. at 752 n.18; *White*, 412 U.S. at 793-797; *Wright* v. *Rockefeller*, 376 U.S. 52 (1964); see also *Shaw* v. *Reno*, 113 S. Ct. at 2827; *id.* at 2841 (White, J., dissenting); *id.* at 2843 (Stevens, J., dissenting); *id.* at 2849 (Souter, J., dissenting).

Moreover, the State's plan in this case does, in fact, incorporate in its two black opportunity districts substantial portions of the voters encompassed in the concentrations of minority voters that would have given rise to a Section 2 claim. District 1 contains the same core minority population from the northeast Coastal Plain that was included in a minority opportunity district in each of the alternative plans that were found by the district court to support a Section 2 suit. District 12, in turn, contains the heavy concentration of African Americans in Mecklenburg County, the same urban component included in the second minority opportunity district in some of the alternative plans. District 12 combines that population with other highly concentrated

urban populations that lie to the north, whereas the alternative districts combined the population with those living in rural areas to the east. The choice between a predominantly urban minority opportunity district and one that combines rural and urban populations is one that the State has discretion to make.

Adoption of appellants' argument would restrict a State to remedying Section 2 violations only by adopting compact districts that might not serve its legitimate districting principles. That would seriously undermine voluntary compliance with the Voting Rights Act and unduly impede the redistricting process. Here, the district court found that the legislature designed the districts in large part to protect incumbents, *id.* at 99a-100a; to create one distinctively rural opportunity district and one distinctively urban district, *id.* at 97a; to meet equal population requirements, *id.* at 96a; to create districts with different and distinctive communities of interest, *id.* at 103a; and to meet territorial contiguity, *id.* at 98a-99a. These are all legitimate state districting objectives.

2. In determining whether District 12 is narrowly tailored to serve the State's compelling interests, the district court looked to this Court's decisions applying a strict scrutiny standard to other types of race-conscious remedial measures and discerned a series of factors to guide its analysis. Those factors include: the efficacy of alternative remedies, the flexibility and duration of the remedy, the relationship of the remedial goal to the proportion of minority group members eligible to receive the benefit of the remedy, and the impact of the remedy on innocent third parties. J.S. App. 57a-64a; see also Gov't Vera Br. 36-37. Also relevant to the court was this Court's statement in *Shaw* v. *Reno* that a plan is not narrowly tailored if it goes "beyond what [is] reasonably

necessary" to achieve the State's compelling interests. 113 S. Ct. at 2831.

The district court made detailed factual findings regarding each of these factors. The court found that the State did not create more black opportunity districts than reasonably necessary to comply with the Voting Rights Act; that the African-American voting majorities in the districts it created are no greater than reasonably necessary to afford the group members a reasonable opportunity to elect candidates of their choice; that each district has only a bare African-American majority; and that the plan provides for minority representation (2 out of 12 seats, or 16.7%) reasonably related to the percentage of African-American population in the State (22%). See J.S. App. 113a.

The State's plan is of limited duration because it will be reconsidered at the time of the next decennial census and will therefore last no longer than reasonably necessary to eliminate the effects of the discrimination it is aimed at redressing. J.A. App. 61a, 113a. The plan does not impose an undue burden on innocent third parties. The districts comply with all constitutionally mandated principles, were based on rational districting principles that ensure fair and effective representation to all included citizens, and were "designed to be and are in fact highly homogeneous in terms of their citizens' material conditions and interests, and do not significantly inhibit access to and responsiveness of their elected representatives." J.S. App. 111a, 113a-114a.

The court found, finally, that the plan does not depart from the State's customary districting practices to such a degree that it indicates that race played more of a role than necessary to meet the compelling state interests. See J.S. App. 100a-101a, 109a, 113a. District 12 serves the legislature's partisan interests and incumbency concerns.

Id. at 100a-102a. It sits in an historically well-recognized geographic area of the State—the Piedmont—that contains urban populations with closely similar political interests.[9] It generally tracks the Piedmont's urban crescent, although it deviates from the crescent to include blacks living in urban areas of high population density in Winston-Salem. Those populations were included instead of the rural African-American populations in the northern counties in order to further the State's community-of-interest objective. See J.S. App. 100a-101a.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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OCTOBER 1995

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[9] Based on a study of 19 socioeconomic and demographic variables, District 12 is ranked second of the 12 North Carolina congressional districts in overall homogeneity; District 1 ranks fourth. Comparisons with districts in the 1982 plan placed current Districts 1 and 12 in the middle range in terms of overall homogeneity. Tr. 764-766; Exh. 401, at 13-14 (Tables 3 and 4). Based on a poll of people in Districts 1, 12, and 4 (chosen for its compactness) in which they ranked 11 issues in terms of their importance and responded to three questions about their support for certain public policies, District 12 is the most homogeneous of the three (Tr. 766-771), and District 1 ranks second. Exh. 401, at 21, 25.